

APR 28 2023

NC OSH Review Commission

**BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA**

COMMISSIONER OF LABOR FOR)	DOCKET NO: 2021 - 6385
THE STATE OF NORTH CAROLINA)	
)	INSPECTION
Complainant,)	NO: 318211869
v.)	
)	CSHO ID: Y3077
AMERICAN SIGN CRAFT, LLC)	
and its successors)	<u>ORDER</u>
)	
Respondent.)	

THIS CAUSE came on for hearing and was heard before the undersigned R. Joyce Garrett, Hearing Examiner for the North Carolina Occupational Safety and Health Review Commission, on April 20, 2023 at 10 a.m., via Lifesize teleconferencing platform, pursuant to a Notice of Hearing.

Complainant was represented by Sage A. Boyd, Assistant Attorney General, North Carolina Department of Justice; Respondent was represented by Mr. William Petroff, President and co-owner of American Sign Craft, LLC. Also present at the Hearing was Ms. Jessica Cann, Vice-President and co-owner of Respondent. No affected employee of Respondent, or its representative, attended to have a say in, or participate as a party in, the Hearing.

Complainant’s sole witness was Lisa Rayborn, OSH Division Compliance Safety and Health Officer (“CHO Rayborn”), who was one of the compliance officers who conducted the OSH inspection in this matter. Complainant’s exhibits C-1 through C-32 (photo exhibits), C-33 (unredacted Investigative File), C-34 (NCDOL FOM Chapt 6), and C-36 (cpl0200051_2021) were admitted into evidence.

Respondent’s sole witness was William Petroff, President and co-owner of Respondent. Respondent presented no exhibits which were admitted into evidence.

Based upon consideration of Respondent’s Statement of Position, Complainant’s Complaint, Respondent’s Answer, and Complainant’s Pre-Hearing Brief and upon stipulations

by the parties at the time of the Hearing¹ and upon the evidence presented at the Hearing the undersigned makes the following Findings of Fact.

FINDINGS OF FACT

1. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes of North Carolina (the "Act" or "OSHA Act").
2. At the time (i) of the Inspection (hereinafter defined) in January/February 2021; and (ii) of the issuance of the citations and notifications of penalty in this matter, and (iii) of the submission of the Notice of Contest dated June 10, 2021, Respondent was a limited liability company active in the State of North Carolina. Subsequently, on June 15, 2021 a Certificate of Administrative Dissolution was filed by the Secretary of State certifying that American Sign Craft, LLC was administratively dissolved under N.C.G.S. Section 57D-6-06 for failure to file an annual report.
3. On November 10, 2020, Complainant received a complaint concerning certain safety and safety and health related hazards at Respondent's facility located in a building ("Building") at 817 W Fairfield Road in High Point, North Carolina (the "Worksite").
4. On or between January 27, 2021 and February 16, 2021, CHO Rayborn conducted an inspection (the "Inspection") of Respondent's Worksite.
5. As a result of the Inspection Complainant issued citations (collectively the "Citations") carrying the following proposed abatement dates and penalties:

CITATION NUMBER ONE (Serious)

<u>Item</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
001a	29 CFR 1910.107(b)(5)(i)	Immediately upon receipt	\$1,500.00
001b	29 CFR 1910.107(b)(9)	Immediately upon receipt	grouped with 1a
001c	29 CFR 1910.107(e)(2)	4/23/2021	grouped with 1a
001d	29 CFR 1910.107(g)(7)	Immediately upon receipt	grouped with 1a
002a	29 CFR 1910.1200(e)(1)	6/2/2021	\$900.00

¹ At the commencement of the Hearing the parties were requested to enter into some stipulations in order to expedite the Hearing. One of the stipulations was "Respondent is an 'employer' within the meaning of N.C.G.S. § 95-127(10); all of Respondent's employees referred to in this matter are 'employees' within the meaning of N.C.G.S. § 95-127(9)". Complainant, through its counsel Ms. Boyd, agreed to the proposed stipulation. Respondent, through its non-lawyer representative Mr. Petroff agreed to the proposed stipulation; however, Mr. Petroff presented evidence at the Hearing which was contrary to the stipulation. Complainant did not object to such evidence. This Court is not obligated to accept stipulations by the parties as facts.

002b	29 CFR 1910.1200(e)(1)(i)	6/2/2021	grouped with 2a
002c	29 CFR 1910.1200(g)(8)	Immediately upon receipt	grouped with 2a
002d	29 CFR 1910.1200(h)(1)	5/11/2021	grouped with 2a

CITATION NUMBER TWO (NonSerious)

<u>Item</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
001	29 CFR 1910.134(c)(2)(ii)	Immediately upon receipt	\$0.00

6. Complainant calculated the proposed penalties and proposed abatement dates according to the procedures set forth in the Complainant’s North Carolina Operations Manual, applying the following Adjustment Factors to the Gravity Based Penalty to calculate the Proposed Adjusted Penalty: 60% credit for size, 0% good faith, and 10% credit for history, for 70% total adjustment.

7. The Citations were issued on April 15, 2021.

8. Respondent submitted a timely Notice of Contest dated June 10, 2021.

9. In Respondent’s Statement of Position which was filed August 3, 2021 Respondent (i) requested that formal pleadings be served; and (ii) expressly stated repeatedly that it had no employees.

10. Complainant timely filed a Complaint. Respondent, appearing without counsel, timely filed an Answer in this matter stating “Bill Petroff, President of American Sign Craft LLC denies any and all allegations of this Complaint and hereby request a formal hearing to defend.”

11. Respondent was in the business of manufacturing custom architectural signage.

12. The Citations pertain to the sign production area of the Building; other work areas in or adjacent to the sign production area included an office space and an embroidery section.

13. Mr. Petroff testified that that Respondent had no employees. He further testified that (i) he was the President and co-owner of Respondent; (ii) Ms. Cann, his daughter, was the Vice-President and co-owner of Respondent; (iii) Respondent did not file any types of reports evidencing that it had employees; and (iv) he did not receive any statements from Respondent that would indicate he was an employee. Mr. Petroff considered himself and Ms. Cann to be self-employed and stated that they were not employees of Respondent.

14. Respondent was not the only tenant occupying the Building. The area occupied by American Sign Craft, LLC included an office space and the sign production area. The embroidery area was leased to another tenant.

15. CHO Rayborn considered Mr. Petroff and Ms. Cann to be the employees of Respondent exposed to the hazards alleged in the Citations. There were two other persons who worked in the

embroidery section whom CHO Rayborn considered to be employees of Respondent exposed to the hazards alleged in the Citations (the "Other Workers").

16. The embroidery section had its own bathroom facilities and a separate entrance to/from the outside. There was no evidence that the Other Workers entered the sign production area except occasionally when UPS/Federal Express delivered to the Other Workers packages addressed to American Sign Craft rather than carrying the packages around the Building and delivering the packages to American Sign Craft at its separate entrance.

17. CHO Rayborn did not observe the Other Workers in the office space or sign production area at any time during the Inspection. The Other Workers were in the embroidery section of the Building which section was sublet to a tenant other than Respondent.

18. CHO Rayborn (i) did not present any evidence that the Other Workers stated that they were employees of Respondent; (ii) did not present testimony that the Worksite was a multi-employer work site; (iii) did not present evidence of any economic relationship between Respondent and the Other Workers; (iv) did not present evidence establishing that Respondent had control over the manner and means of work performed by the Other Workers, or that Respondent hired or could fire the Other Workers, or that Respondent provided any employee benefits to the Other Workers; and (v) did not present any evidence that Respondent had control over the Other Workers or that the Other Workers were assigned any job responsibilities in the premises occupied by Respondent including the sign production area.

19. With respect to the Other Workers the evidence showed that (i) the Other Workers were employees of a company other than Respondent; and (ii) Ms. Cann was the owner of the other company, and as such owner had supervisory control over the Other Workers, the authority to hire/fire the Other Workers, and gave the Other Workers their work assignments.

20. CHO Rayborn (i) did not present any evidence that Mr. Petroff or Ms. Cann stated that they were employees of Respondent; (ii) did not present evidence of any economic relationship between Respondent and Mr. Petroff or Ms. Cann; (iii) did not present evidence establishing that Respondent had control over the manner and means of work performed by Mr. Petroff or Ms. Cann, or that Respondent hired or could fire Mr. Petroff or Ms. Cann, or that Respondent provided any employee benefits to Mr. Petroff or Ms. Cann; and (iv) did not present any evidence that Respondent had control over Mr. Petroff or Ms. Cann.

21. CHO Rayborn testified that she considered Mr. Petroff and Ms. Cann to be managers who were employees of Respondent based on the statement under "Company Officials" at the end of the information sheet on page 058 of Complainant's Exhibit 33 that "All LLCs are managed by their managers pursuant to N.C.G.S. 57D-3-20." CHO Rayborn did not consider Mr. Petroff and Ms. Cann to be members of Respondent.

22. CHO Rayborn testified that she considered the Other Workers to be employees of Respondent because the Other Workers were working in the Building in which Respondent was

located; however CHO Rayborn acknowledged that she did not know the identity of the employer of the Other Workers.

23. Mr. Petroff was a 51% owner of Respondent and a member of the Respondent. Ms. Cann was a 49% owner of Respondent and a member of Respondent.

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. The burden of proof is on the Complainant to prove that Respondent's employees were exposed to the hazard covered by the cited standards.

3. Complainant failed to carry its burden of proof to show that Mr. Petroff, Ms. Cann and/or the Other Workers were employees of Respondent.

4. With respect to each of the alleged violations in the Citations, Complainant failed to carry its burden of proof to establish that there was employee exposure to the hazard alleged.

DISCUSSION

Respondent was administratively dissolved effective June 15th, 2021 pursuant to the procedure set forth in N.C.G.S. Section 57D-6-06. As provided in N.C.G.S. Section 57D-6-07(a) "After its dissolution, an LLC shall wind up. The winding up may include continuing the business of the LLC for a period of time." According to N.C.G.S. Section 57D-6-07(f) the "dissolution of the LLC does not prevent commencement of a proceeding by or against the LLC in its own name, abate or suspend a proceeding by or against the LLC...".

Accordingly there is no impediment to conducting this Hearing involving a limited liability company which has been administratively dissolved.

To establish a violation of a specific OSHA standard, Complainant must establish: (#1) the standard applies; (#2) the terms of the standard were violated; (#3) employees were exposed to the hazard covered by the standard; and (#4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *JPC Grp., Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). The elements are collectively referred to herein as the "Required Elements".

Complainant has the burden of establishing each Required Element by a preponderance of the evidence. *Commission Rule .0514(a)*; *See Hartford Roofing Co.*, 17 BNA OSCH 1361 (No. 92-3855, 1995). A preponderance of the evidence is "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably

true than false.” *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2131, n. 17 (No. 78-6247, 1981) *aff’d in relevant part*, 681 F.2d 69 (1st Cir. 1982). See also *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994)

A respondent who has been issued a citation can present evidence which negates or reduces the validity or strength of Complainant’s evidence offered to support a Required Element; however, the respondent does not have the burden to prove that it is not liable for an alleged violation. The burden of proof of each Required Element for each alleged violation rests entirely on the Complainant.

The general rule is that members of a limited liability company are not considered employees of the company for tax purposes. However, whether a person is an employee of a company for tax purposes is not determinative of whether that person is considered an employee of the company for purposes of the OSHA Act.

The courts have identified different analysis methods that can be used to determine whether an employment relationship exists – in summary, an economic realities analysis and a general common law of agency analysis. See *Loomis Cabinet Company v Occupational Safety & Health Review Commission*, and *Lynn Martin, Secretary of Labor*, 20 F.3d 938 (9th Cr. 1994); *Nationwide Mutual Ins. Co. v. Darden*, --- U.S. ---, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992); *Clarkson Const. Co. v. OSHRC*, 531 F.2d 451 (10th Cir. 1976); *Griffen & Brand of McAllen, Inc.*, 6 O.S.H.Rep. (BNA) 1702 (1978). Analysis of whether a partner in a partnership is an employee of the partnership can be quite complex. See *Marilyn Wheeler v. Main Hurdman*, 825 F.2d 257 (10th Cir. 1987).

In this matter:

Complainant alleged that Mr. Petroff, Ms. Cann and the two Other Workers were employees of Respondent and that these were the employees exposed to the alleged hazards. However, Complainant did not present evidence regarding the economic relationship between Respondent and Mr. Petroff and Ms. Cann or regarding the manner and means by which the Respondent exercised control/supervision over them; further Complainant merely asserted that the Other Workers were employees of Respondent but did not introduce evidence of any economic relationship or that Respondent had any control/supervision over them (Complainant did assert that Ms. Cann supervised the Other Workers but evidence showed that Ms. Cann was an owner of another company which employed the Other Workers). Complainant did not present this case as a multi-employer work site situation.

Respondent argued that (i) Mr. Petroff and Ms. Cann are members of Respondent and as members are not employees of Respondent, and (ii) the Other Workers are employees of another company and that Respondent had neither an economic relationship with the Other Workers nor control/supervision over their work and that the Other Workers did not work in Respondent’s premises but merely passed through occasionally.

In order for the Act to be applicable to a respondent that respondent must have employees exposed to the alleged hazard covered by the cited standards. Complainant did not carry its burden of proof regarding employee exposure since it did not establish by a preponderance of the evidence that Mr. Petroff, Ms. Cann, and/or the Other Workers were employees of Respondent.

Having concluded that the Complainant did not carry its burden of proof with respect to Required Element #3, the undersigned does not address the evidence pertaining to the remaining Required Elements.

Respondent was not represented by counsel at the Hearing. The Undersigned wants to make clear that the decision in this matter does not mean that, with respect to enforcement of the OSHA Act, the referenced workers were not employees of Respondent. This decision merely means that the evidence presented at the Hearing was not sufficient to prove that the referenced workers were employees of Respondent for purposes of the OSHA Act.


ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that

Citation 01 Item 001a, Item 001b, Item 001c, and Item 001d are VACATED;
Citation 01 Item 002a; Item 002b, Item 002c, and Item 002d are VACATED; and
Citation 02 Item 001 is VACATED.

SO ORDERED

Date: April 25, 2023


R. Joyce Garrett
Hearing Examiner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

BILL PETROFF
AMERICAN SIGN CRAFT LLC
PO BOX 390
TRINITY NC 27370

By depositing same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid at Raleigh, North Carolina, and upon:

SAGE A BOYD
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101
carla.rose@labor.nc.gov

via email.

THIS THE 1 DAY OF May 2023.



Karissa B. Sluss
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589
NCOSHRC@labor.nc.gov

